

NO. 47379-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

CHARLES EDWARD PASCHAL, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00502-6

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

- I. Evidence of Paschal's prior bad act was properly admitted**
- II. The trial court's limiting instruction was not a comment on an evidentiary matter to be decided by the jury.**
- III. The defendant received effective assistance of counsel**
- IV. The trial court properly held that the rape and assault convictions did not merge**
- V. The trial court properly found the assault and the rape were separate and distinct conduct, and properly sentenced these crimes under RCW 9.94A.589 (1) (b).**
- VI. The court considered Paschal's ability to pay legal financial obligations on the record, and paschal failed to preserve this claim by objecting below.**
- VII. The court correctly instructed the jury on reasonable doubt.**

## **STATEMENT OF THE CASE**

### **A. SUMMARY**

The defendant, Charles Paschal, brutally assaulted his girlfriend and the mother of his two children, Katherine Martin. While their seventeen month-old son slept downstairs and the couple's five year-old daughter, along with the Paschal's seven year-old daughter from a previous relationship, watched television and eventually slept in an adjacent room, Paschal pummeled Katherine repeatedly with closed fist punches to the face and head, raped her, and ultimately strangled her to the

point where she felt she would die. Katherine tried to escape but was yanked away from the dead-bolted front door by her hair. The violent attack lasted several hours before Katherine was able to escape, naked except for a bra, out a back door when Paschal became distracted by their children who had opened the bedroom door in response to Ms. Martin's screams. Despite the vicious beating she received, Katherine's primary concern was for the children she was forced to leave behind in her attempt to save her life. Following Katherine's escape, the defendant fled the home with the two young girls while abandoning the infant. Katherine's infant son was found alone in the house by police. Katherine's daughter and step-daughter were found unharmed several hours later.

## B. TRIAL TESTIMONY

### *1. Katherine Martin*

Katherine Martin and Charles Paschal were involved in a dating relationship for six and a half years. RP 237. They have two children together. RP. 236. Katherine is a CPA at a Vancouver accounting firm. RP 236. At the time of this assault, Katherine and Paschal's daughter was five and their son was seventeen months-old. RP 236, 273. Katherine described the relationship as rocky. RP 237. They had an altercation about three and a half years prior to this assault, in which Paschal hit Katherine in the face



three times and broke her nose. RP 238. She went to the hospital for that injury but left before treatment could be provided. RP 239. She preferred to deal with it on her own. RP 239. Following that incident Paschal was very apologetic, and they went on with their lives. RP 243.

Katherine owns a house. RP 245. On the day of March 16, 2013, Katherine and Paschal discussed getting back together and the possibility of Paschal moving in. RP 245. They also discussed Paschal working out of the home as a barber, and went to Ikea that day to purchase items for the business. RP 245. That evening, Paschal brought his daughter from a previous relationship, Charlise, to the house. RP 245-46. Charlise and Chanelle, Katherine and Paschal's daughter, were making spaghetti and hot dogs. Id. Katherine went back and forth between the upstairs, where the children were, and downstairs where Paschal was setting up his barber business with the items from Ikea. RP 246. Paschal became angry with Katherine for going upstairs to be with the kids, wanting her to be downstairs with him. RP 246. Katherine recalled a lot of arguing. RP 246. Her next memory was being upstairs on the couch, but she couldn't recall why they both ended up in the living room. RP 246-47. The girls were in the upstairs master bedroom and Katherine's son was asleep downstairs. RP 247. If the girls were to open the master bedroom door, they would see into the dining room, kitchen, and living room. RP 247. All of the children

were within earshot of things occurring in the living room, dining room, or kitchen. RP 248. The home is not that large. Id.

The girls were watching a movie in the master bedroom. RP 248. Katherine recalled that she and Paschal were still arguing (although she can't recall what about), and that Paschal slapped her on the face with an open hand. RP 248-49. Katherine was shocked. RP 249. She expected it to end at that, "but that didn't happen." RP 249. Katherine looked at Paschal and he didn't look like himself. RP 249. "[H]e didn't even look like himself or that there was anything even behind his eyes. It was an absolutely evil person. And I knew that...that he was going to hurt me." RP 249. Katherine said that after that, "it happened so fast, it went from the slap, to right away closed fist hitting me in my face and my head." RP 249. Katherine and Paschal had been drinking on the couch prior to the assault. Id. Paschal was drunk. RP 250.

Paschal punched Katherine with a closed fist all over her face, head, and the back of her head. RP 250. It was constant, and there were too many blows to count. RP 250. Paschal would walk away for a few seconds, giving Katherine a "break," and he would pace and say "All I wanted to do was love you. All I wanted to do was love you." RP 250. Then he would come back and resume the assault. Id.

Katherine begged him to stop, telling him she loved him. RP 251. She wanted to placate him with pledges of her love. RP 251. She begged Paschal to call 911 because she was hurting so bad. RP 251. Katherine said “I’d never been hurt this bad and I knew with all of my head stuff, something was wrong.” RP 251. The pain was all over her head, and she could feel the blood coming down her face.” RP 251. She just wanted it to end. RP 251. But it didn’t.

At one point, perhaps because the children made a noise, Paschal got up and walked away. RP 252. She recalled thinking that she had to get to the front door but she couldn’t get there fast enough. RP 252. Paschal reached her before she got to the door and yanked her back by her ponytail. RP 252. Paschal began banging her head into the stairs. RP 252. Paschal pulled her up the stairs and into the kitchen. RP 252. Katherine’s impression was that because there was so much blood, Paschal took her to the kitchen to clean her off to avoid ruining the carpet. RP 252-53.

Paschal handed her a rag and told her to hold it to her face. RP 253. She was bleeding from her nose and possibly elsewhere, and was in excruciating pain. RP 253. Katherine realized that her begging was not going to get Paschal to stop, and she realized this was now a life-or-death situation. RP 253. She felt determined to survive. Id.

Paschal would walk and pace during the “breaks.” RP 253. She couldn’t escape during the breaks, however, because she was helpless and her body felt so heavy. RP 254. Following the episode in the kitchen where Paschal had her wipe off her face, they ended up back in the living room. RP 254. Katherine can’t remember how they got there. RP 254. They were on the floor in front of the couches. Id.

As Katherine bled with a towel in her hand, Paschal demanded she perform oral sex on him. RP 255. Paschal was trying to become erect by rubbing his penis against her, but when that didn’t work he wanted her to put his penis in her mouth. RP 255. She was not free to move. RP 255. He forced her to put his penis in her mouth. RP 256. He also hit his penis against her cheek. RP 256. Katherine actually felt relief during the rape, because she felt it might be an opportunity to appease Paschal, and because she welcomed the break from the beating and the pain. RP 256. She felt this was a break where she could “get some strength.” RP 256. He was hitting her during this time, but “it wasn’t as intense.” RP 256. He was pulling on her face, opening up her mouth and forcefully pushing his penis in her mouth. RP 256. She doesn’t recall him saying anything during this “portion.” RP 257. He did not strangle her during this episode. RP 289. He did not ejaculate. RP 257.

Once this episode ended, Paschal became enraged and dragged her from in front of the couches to the dining room. RP 257. Once in the dining room Paschal put Katherine into a wrestling-type hold. RP 258. Katherine doesn't know what the move was, only that its purpose was to strangle her. RP 258. She was on her stomach, face down, and Paschal had his legs wrapped around her and an arm wrapped around her neck. RP 258. She struggled against him. RP 259. Katherine couldn't speak, but Paschal repeatedly said [I'll] rape you, kill you, and take all your money." RP 259. Katherine described him saying it as though it was a mantra. RP 259. While strangling Katherine, Paschal also put his hands over her mouth and her nose to ensure she couldn't breathe. RP 259. Katherine recalled trying to bite his hand, but couldn't recall if she was successful. RP 259. Either way, it didn't make Paschal stop. RP 259. Katherine described Paschal's enjoyment: "He would let go, and it was like this game where he would let go—I almost feel like he was like laughing, letting go, letting me get these couple breaths back and then to just go right back at it again and see me fight." RP 259-60. At this point Katherine felt she was going to die. RP 260. She could think of no way to dissuade him. Id.

At some point during the torture by strangulation episode in the dining room, the girls opened up the bedroom door. RP 260. The kids

were screaming. RP 261. Paschal ran to the door, and when he did Katherine got up and fled to the patio door and escaped the home. RP 260. She knew it was her last chance to save her life. RP 262. Because Paschal had ripped off her clothes at some point prior to the rape, she was wearing only a bra when she fled. RP 263. As she fled into the back yard, she was in a state of panic, believing that Paschal was right behind her. RP 263. It was dark out and she had to jump over a wooden fence separating her yard from her neighbor's yard. RP 264. She was screaming. RP 264. She sustained scrapes on her legs. RP 264. She came upon another cyclone fence, scaled it as well, and she was banging on the house and screaming. RP 264. She again sustained scrapes. RP 265. She urinated on herself during her escape. RP 301. She left bloody handprints sprawled across the house. RP 264. No one came to her aid, so she ran through their gate and ran a block and a half until she found a house with a light on. RP 264. She screamed for help and someone answered the door. RP 265. Katherine felt "like I was finally free. Like they saved me and I could just lay there and not be scared." RP 265. Her relief was very short lived, as she recalled that her kids were still at the house with Paschal. RP 266.

During the 911 call, made by Ruslan and Ludymilla Deynega, the neighbors who answered her plea for help, one of the first things relayed by the Deynegas, after telling the 911 operator that Katherine was

bleeding, was that “she’s got three kids in some house. I have no idea what she’s saying.” RP 268. When Katherine is put on the phone with 911, she immediately began to relay her address and said “I have three kids in the house. They’re in extreme danger.” RP 269. When asked by the dispatcher what happened, Katherine said “He is insane and it’s my children’s father and he wants me dead. I am beat up. I am beat up and extremely beat up.” RP 269. After identifying Paschal as her assailant, Katherine lost consciousness. RP 269. Ruslan Deynega told the dispatcher she was “half naked and beat up.” RP 270. Ruslan told the dispatcher “[h]er face is all bloody. Her—she’s got—her eyes on both—black eyes and her—out of her nose and out of her lips.” RP 270-71.

When Katherine regained consciousness and was returned to the phone the dispatcher asked her if Paschal had any weapons. RP 272. An obviously confused Katherine replied “There’s a weapon—my kids.” RP 272. When asked how old her kids are she initially said she had a “17 year-old daughter,” but then clarified it was a 17 month-old baby, as well as a five year-old and a seven year-old. RP 272-73. Katherine said Paschal had held her hostage for hours and beat her for hours. RP 273. Then she begged the dispatcher “Please help my kids.” RP 273. Ruslan said “This is shocking. Can you have somebody here quick?” RP 273. At that point Ruslan tries to comfort Katherine, who said she felt “horrible.” RP 274.

Ruslan assured her he would protect her and she was in good hands. RP 274. Katherine again wailed “But I need my kids. I need my kids.” RP 274. Ruslan assured her the police would rescue her kids. RP 274. Ruslan described Katherine as hysterical, talking about her kids. RP 275. The 911 call ended shortly thereafter because the ambulance arrived. RP 276.

Katherine remained in a continued state of panic about her kids. RP 277. She thought that if Paschal had gone that far with her, that he must be doing something to her children. RP 277. When she was placed in the ambulance, she recognized one of the EMTs as the husband of one of her best friends. RP 277. He, however, didn’t recognize her. RP 277. She had to call out his name before he realized it was her. RP 277.

At the hospital, Katherine finally learned that her son, Eli, had been left alone in the house but that Paschal had fled with Chanelle. RP 277. During her conversations at the hospital Katherine remained very upset, trying to remember any place Paschal might have taken Chanelle so she could assist police in finding her daughter. RP 278. Katherine recalled that they called in a specialized nurse to look at every inch of her. RP 278.

Katherine missed two weeks of work and had pain to the touch all over her body. RP 280. Her extensive injuries are depicted in each of the exhibits listed in the supplemental designation of exhibits.



During cross examination, Paschal asked Katherine whether she had told Deputy Kennison that Paschal had never struck her before, and she confirmed that she likely said that and that it was something she would have trained herself to say. RP 287. Paschal also questioned Katherine about statements she made to Detective Luvera, even though Luvera had not yet testified and the court had not yet been asked to rule on whether Luvera could testify about Katherine's statements. RP 287-89. Paschal elicited that Katherine told Detective Luvera that she (Katherine) had bitten Paschal's hand, which caused him to remove his hand from her mouth. RP 287. Paschal also elicited that Katherine may have told Luvera that Paschal shoved his penis into her gums and that it was erect when he slapped it against her face, contrary to her testimony on direct about his penis not being erect. RP 288. Paschal also elicited that Katherine told Luvera that she considered biting Paschal's penis during the rape. RP 289. She abandoned the thought when she considered that compliance during the rape might appease him. RP 289.

Paschal also questioned Katherine about a statement she made to the SART nurse (Nurse Jorgensen), even though Nurse Jorgensen had not yet testified and the trial court had not been asked to make a ruling on the admissibility of Katherine's statements to her. Paschal asked Katherine whether she told Jorgensen she had caused Paschal to assault her because

of something she said. RP 290. Katherine went home from the hospital the following morning, and her father helped her clean up the blood in her house. RP 641.

## *2. Deputy Kennison*

Deputy Kennison of the Clark County Sheriff's Department responded to the 911 call in the early morning hours of March 17, 2013. RP 155. He spoke to Katherine while she was in the ambulance. RP 157. She was panicked, scared, and in a great deal of pain. RP 157. It appeared to Kennison that Katherine had been punched repeatedly. RP 157. Her face was swollen and her eyes were swelling shut. RP 158. She had blood coming out of her mouth, her nose, and possibly her eye. RP 158. Her face was "completely red and swollen." RP 158. Katherine told Deputy Kennison that she had been at home with her long-term boyfriend and father of her children, Paschal. RP 158. While sitting on the couch having a drink Paschal reached over and punched her in the face repeatedly, and he eventually mounted her. RP 158. He continued to punch her in the face as he straddled her. RP 158. He tried to cover her nose and mouth with his hand to prevent her from breathing. RP 159. She told Kennison she felt as though she would suffocate and die. RP 159. She said she'd bitten his hand. RP 159. She said she attempted to escape by running out the front door but he had yanked her back by her hair and continued punching her.

RP 159. She told Kennison she was eventually able to escape out the back door, scaling several fences before reaching the house where she eventually got help. RP 159. Katherine was concerned about her children and step-child; in fact it was her primary concern. RP 160. Following his conversation with Katherine, Kennison went with other deputies to Katherine's home. RP 161. They found blood on a back door and their concern for the children heightened. RP 161. The front door was unlocked, and they entered the home after knocking and announcing. RP 161. When nobody appeared in response they did a sweep of the house. RP 162. The deputies found the television on in the living room and signs of a disturbance, such as couch cushions and clothes on the floor and things tipped over. RP 162-63. There was a stove burner on, lit up bright orange. RP 163. Downstairs, on a bed in a young girl's room, Kennison found an infant by himself, with a bottle of milk. RP 163. Kennison stayed with the infant for about fifteen minutes until another deputy relieved him, and proceeded to the hospital to stay with the victim until detectives could arrive. RP 163-64. He arrived at the hospital at about 4:20 in the morning. RP 166.

When he re-contacted Katherine at the hospital, her daughter and step-daughter were still missing and Paschal remained at large. RP 167. She was still afraid for her safety as well as the safety of her children. RP

167. During this second conversation at the hospital Katherine revealed that Paschal had raped her by forcing his penis into her mouth. RP 167. Kennison was asked about what injuries he observed on Katherine, and he described that her swelling had increased, one of her eyes was nearly swollen shut, there was still blood around her nose and mouth, and she had scratches on her legs from when she scaled the fences. RP 168. The prosecutor asked, without objection, whether these visible injuries appeared consistent with her account of how she received them, and he said they were. RP 168.

During cross exam, Paschal elicited additional statements that Katherine made to Deputy Kennison. In particular, Paschal asked Kennison whether Katherine told him that she bit Paschal on the hand several times, to which Kennison replied yes, she told him that she bit Paschal on the hand “repeatedly.” RP 173. Paschal also asked Kennison several questions about what Katherine told him about what she and Paschal had to drink that night. RP 171-72. On re-direct, because Paschal had asked several questions about the drinking, the prosecutor asked what Katherine had told him about the defendant’s alcohol consumption, and Kennison relayed Katherine’s statement that Paschal had been taking swigs of liquor during the assault. RP 175.

### *3. Paul Bustamante*

Paul Bustamante is an EMT with AMR ambulance services. RP 198. He was dispatched to this 911 call at 3:00 a.m. on March 17, 2013. RP 198. He arrived at the Deynega residence and contacted Katherine. RP 201. Katherine had obvious injuries to her face and extremities. RP 201. She had trauma to the face, eyes, and lips, there was dried blood from her nose. RP 202. The blood was “very dried,” and needed to be cleaned off because it was interfering with her ability to breathe through her nose. RP 204-05. It was very painful for her to open her eyes. RP 204. She was distraught, and kept referring to having left her children at home. RP 202. It was “very much her primary concern.” RP 202. Bustamante called dispatch to upgrade the police response to lights and sirens because Katherine was reporting that she had been assaulted and was forced to leave her children at home. RP 203. She was so worried about her children that it was interfering with her ability to answer his necessary medical questions. RP 203. Katherine told Bustamante that she had been assaulted by her boyfriend for several hours before finally escaping. RP 205. She said she’d been held against her will and repeatedly struck in the face. RP 206. She said she’d been strangled and that Paschal had placed his hand over her mouth to prevent her from breathing. RP 207. She also said he’d held her to the ground and forced his penis into her mouth. RP 207. She

escaped when finally presented with the opportunity, as she believed it was the only way she could get help for her and her children. RP 206. Katherine told him that throughout the assault, Paschal was drinking from a liquor bottle. RP 208. Bustamante was asked, without objection, whether the injuries visible on Katherine were consistent with her account of how she received them, and he said they were. RP 208, 209. After fifteen minutes of treating Katherine she alerted him to the fact that they knew one another. RP 211. Her injuries had rendered her completely unrecognizable. RP 211. Bustamante did not note any odor of alcohol coming from Katherine. RP 209. They arrived at the hospital at 3:46 a.m. RP 210. During cross exam, Paschal elicited several additional statements from Katherine, including that she reported being punched with a closed fist. RP 215. Paschal also elicited that Katherine had rated her pain as four on a scale of one to ten and did not report headache despite her claim of closed fist punching. RP 213-15.

#### *4. Christopher Thomas*

Christopher Thomas, another EMT with AMR, responded to this 911 call with Mr. Bustamante. RP 221-22. Katherine was very distraught when the ambulance arrived. RP 223. Thomas and Bustamante needed to determine the mechanism of her injury in order to treat her but her monomaniacal fear for her children was impairing their ability to treat her.

RP 224. Katherine told Thomas that she was punched multiple times several hours prior, and he was concerned about the visible trauma to her head. RP 226.

5. *Sgt. Allais*

Sgt. Allais supervises the Major Crimes detective unit for the Clark County Sheriff's Office. RP 445. He testified that he received a call about this case from a patrol sergeant at 3:58 a.m. on March 17, 2013. RP 447. He received information that there had been an assault, and the perpetrator had left with the child he had in common with the victim. RP 448. Allais traveled to Peace Health hospital to contact the victim. RP 448. He arrived at approximately 4:45 a.m. RP 448. Allais was asked if he was able to make any initial observations of Katherine Martin. RP 448-49. He replied, without objection:

She had—she was bloody...[S]he had blood everywhere—I think on her lip—appeared to have been strangled. I have done this for 26 years, and as I looked at her I was thinking this is probably the worst domestic assault that I've seen. Of course, she was crying, very upset about where her daughter was.

RP 449.

During cross examination Allais retracted his comment about this being the worst domestic case he's seen. RP 494. He admitted that he had investigated far worse cases, including a domestic violence homicide

committed with a hammer. RP 494. He also appeared surprised at having made the remark, stating “did I say worst?” RP 493.

Allais testified that as he spoke to Katherine, her primary concern was the location of her missing daughter, not herself. RP 449. Allais was also asked about why it appeared to him that Katherine had been strangled, and he replied that her neck was red and that he saw petechiae. RP 450. Defense counsel objected to the latter remark, but the court overruled the objection, stating that it was an observation. RP 450.

#### *6. Detective Luvera*

Detective Beth Luvera is a domestic violence detective with the Clark County Sheriff’s Department. RP 312. She has received over 350 hours of training in domestic violence. RP 313. She received a call from Sgt. Allais at about 4:15 a.m. on March 17, 2013, instructing her to meet with Katherine Martin at the hospital. RP 317. Luvera arrived at the hospital at about 5:30 a.m. RP 318. Luvera saw a “tremendous” amount of injury to Katherine’s face. RP 318. Her left eye was completely swollen shut. RP 318. She had dry, crusty blood on her lips. RP 318. There was blood on her nose, and it appeared as though blood had dripped out of her right eye. RP 318. The entire white of one of Katherine’s eyes was blood red. RP 318. Luvera was asked if she observed the presence of petechiae, and she said she did. RP 319. Luvera saw the petechiae in Katherine’s



right eye, as well as behind one or both ears. RP 319. She also believed it was present on Katherine's neck. RP 319.

Katherine was crying, very emotional and upset, and blurting things out. RP 320. Katherine told her the following:

My legs wouldn't work. They had nothing left. I remember thinking if the kids could see me kick my legs, my kids could hear me and they'd open the door – saw me...He's a wrestler; he had me in a hold; I was able to bite his hand. I felt like I was going to die. It felt like it wouldn't end. I asked him, why are you doing this? And he'd hit me again. He said, "I'm going to rape you, too." He took it out and put it in my mouth. And I wanted to bite it.

RP 320.

Katherine was sobbing as she related her story. RP 321. Katherine told Luvera that they'd all been at the house and the girls were making dinner while Paschal worked in the garage. RP 323. Paschal became angry because he felt Katherine was paying too much attention to the kids. RP 323. They also argued because Katherine did not allow smoking in her house but Paschal smoked anyway. RP 323. Katherine went upstairs to get away from Paschal. RP 323. He came up a short time later and began cussing at her. RP 324. He slapped her in the face. RP 324. Katherine said Paschal became angrier each time he hit her. RP 324. Katherine said Paschal took her clothes off. RP 324. She said he dragged her into the kitchen because he didn't want to get blood on the carpet. RP 324. She

asked him to call 911. RP 324. Katherine was jumping all over the place in her scattered recitation of what happened. RP 325. Katherine related her failed escape attempt, as well as Paschal's threats to rape and rob her. RP 326. Katherine described receiving closed fist blows. RP 327. Katherine also described Paschal's "breaks," where he would pace and say "I just wanted to love you." RP 328. Katherine also described Paschal drinking Bacardi rum throughout the assault. RP 328. Katherine told Luvera that she tried to appease Paschal, to no avail. RP 328-29. Katherine described Paschal using a wrestling move on her to put her in a chokehold. RP 336. Katherine described him placing his hand over her mouth and nose. RP 336. Finally, Katherine described Paschal forcing his penis into her mouth. RP 339. Katherine believed Paschal was going to kill her. RP 340. Luvera testified that the injuries she observed on Katherine appeared to be consistent with her account of how she received them. RP 341.

#### *7. Nurse Ruef*

Anna Ruef is an ER nurse at Southwest Washington Medical Center and was working the night Katherine was admitted. RP 536. Ruef testified that Katherine appeared frightened, very tearful, and was crying. RP 537. Katherine described being held captive for two hours and beaten severely. RP 537. Ruef observed multiple abrasions to the back of the head and on the face as well as bruising all over the body. RP 537. Ruef

recalled being pretty shocked when she saw Katherine. RP 538.

Katherine's eyes were swollen shut. RP 538. It was the most severe case of domestic violence she has seen in the ER throughout her practice. RP 538.

8. *Dr. Eggen*

Dr. John Eggen was on duty the night of March 17, 2013 at PeaceHealth Southwest Hospital<sup>1</sup>. RP 510. Dr. Eggen treated Katherine Martin and testified she arrived at the emergency room at 4:00 a.m., and he saw her at 6:00 a.m. RP 510.

Dr. Eggen observed scattered bruising on Katherine's body. RP 513. He observed injuries to Katherine's head and ordered a CT scan. RP 517. He observed blunt force trauma to her face consistent with punching. RP 518. He indicated this type of trauma would involve a number of separate blows. RP 518. The blows would have to be of significant force. RP 518.

Dr. Eggen went on to say that Katherine also suffered a broken nose. RP 518. This was confirmed by the CT scan. RP 518. The doctor indicated that it takes considerable force to break a nose. RP 519. That is, you can't just slap somebody to break her nose. RP 519.

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<sup>1</sup> For clarity, the witnesses refer to the hospital by different names. The name of the hospital is PeaceHealth Southwest Washington Medical Center.

Dr. Eggen also described the mechanism of petechiae being a significant cutting off of blood. RP 511. Dr. Eggen observed petechiae on Katherine's head and neck, caused by strangulation that cuts off blood supply. RP 512. Dr. Eggen explains that petechiae is indicative of significant force and could include life threatening force to the airway. RP 514. Katherine had a subconjunctival hemorrhage in her right eye. RP 515.

Katherine told Dr. Eggen that she had been sexually assaulted, held captive, and hit in the face with a fist. RP 520. Katherine described loss of consciousness. RP 520. Katherine was discharged at 11:00 a.m. that morning. RP 521.

#### *9. Nurse Jorgensen*

Julie Jorgenson is a SANE nurse. RP 618. She was called out at 6:19 and arrived at the emergency department at 7:10. RP 621. She received the report from the charge nurse. RP 621. Nurse Jorgenson indicated that she introduced herself to Katherine and made sure Katherine consented to the exam. RP 622. Nurse Jorgenson noted that she had to take two pages to document all of Katherine's injuries. RP 622. She recalled that Katherine was tearful and upset. RP 623. Katherine told Nurse Jorgenson that she had chomped on the defendant's hand during the attack. RP 626-627. Jorgenson described Katherine's injuries as swelling on the back of the head with multiple red abrasions on the scalp and finger

marks on the arms. RP 632. Katherine had dirt and grass in her vagina and dirt in her anus. RP 633. Jorgenson described Katherine's injuries as significant. RP 633.

*10. Ruslan and Ludymilla Deynega*

Ludymilla Deynega testified that Katherine came to her house naked. RP 556. Katherine told Ludymilla that she had been held in her house but finally managed to escape. RP 557. Katherine was scared and was pleading for help. RP 557. Ludymilla described seeing a lot of blood. RP 557. Ludymilla said Katherine passed out a couple of times and expressed concern for her children. RP 559. Katherine told the Deynegas she was raped. RP 564.

Ruslan Deynega described Katherine as bloody and injured. RP 566. He said Katherine was hysterical, saying "my kids" and "help". RP 567. Katherine told him she had been held captive by her boyfriend or husband. RP 567. Ruslan said Katherine was in shock and it was clear her primary concern was for her kids. RP 567. She had a bloody swollen face and dried blood on her legs. RP 567. Ruslan said Katherine faded in and out of consciousness. RP 568. He said she did not appear intoxicated. RP 568.

## *11. Paschal*

### a. Direct examination

Paschal testified in his defense. Paschal is an entertainment promoter, a barber, and a performer. RP 684. He testified that he met Katherine at a club in Portland. RP 683. Paschal said he'd been a barber for 23 years, and had a large clientele in Portland and Vancouver. RP 685. He testified he is able to make a good living, and contributed to the living expenses he ultimately shared with Katherine after they began living together. RP 685-86. At the time of trial he was also doing studio recording and writing music. RP 689. Paschal is also a former state champion wrestler from Oregon, and a trained fighter. RP 705-06. He boasted that he knows how to handle himself in a fight. RP 706.

Paschal admitted that the home in which he assaulted Katherine was her home, not his. RP 690. He had contributed nothing to the purchase of the home. RP 690. On the day of the assault Paschal picked up his daughter Charlise and took her to Katherine's home. RP 692-93. He claimed that when he arrived, Katherine was "impaired." RP 693. Paschal was drinking throughout the night. RP 695. While in the garage setting up his new barber shop, he and Katherine had a dispute about him smoking in the house. RP 697. Paschal informed Katherine that in spite of her wishes that he not smoke in her house, he was going to do it anyway because he

felt it inconvenient to have to go outside. Id. Why should he have to interrupt his work to go outside, Paschal asked? Id. Why should he have to keep going back and forth? Id. Katherine “copped a big attitude about it,” and became “real bossy.” Id. As a result, they argued throughout the night, according to Paschal. RP 697-98. He felt that Katherine was being “petty” about the smoking in her home, and continued to be upset by his behavior. RP 698-701.

Paschal finished his work at about midnight and went upstairs. RP 701-02. Katherine kept “nagging” him. RP 702-703. Katherine asked him to leave her home, but Paschal refused. RP 704. He felt that because he had brought his daughter to the home he was entitled to remain in Katherine’s house regardless of her wishes. RP 704. Katherine continued “nagging” him. RP 704. Paschal claims that Katherine struck him. RP 705. He testified he “shoved her back a little bit” and asked her to stop hitting him. RP 705. He claimed that after Katherine struck him a second time, he “struck her, like, five times with my back hand, pow, pow, pow, pow, pow.” RP 706-07. He described them as hard strikes to the nose. RP 707. Katherine began to bleed, getting her blood on the staircase as she reeled backward from the force. RP 707. Paschal told her “[S]ee? That’s what I didn’t want to do.” RP 707. He then “helped” her to the kitchen floor so she wouldn’t get blood on the carpet. RP 707. He claimed that Katherine

started spitting blood “everywhere,” and was “touching everything and spitting from side to side.” RP 707-08. This would explain why the officers found blood throughout this area of the house. Paschal “attempted to help her clean up.” RP 708.

When Paschal went to wet the towel so he could continue helping her clean up, Katherine bolted for the door. RP 708. Paschal ran after her and stood in front the door, asking “why are you doing this? We have kids in here.” Id. Paschal testified she wouldn’t have been able to get out anyway because the door was deadbolted. Id. She walked back upstairs and he followed her. Id. He again asked her why “she” was “doing this.” Id. He told her he loved her. Id. Katherine wanted to call an ambulance, but Paschal would not allow it. RP 710. He told her that he would take her to the hospital but that as a condition of him doing that, they needed to clean up the blood first because she was bleeding all over him. Id. The bleeding “wouldn’t stop,” and she had gotten blood on him when he was “helping her clean her nose up.” Id. He claimed that he removed his pants and his boxers in an effort to clean up and was moving toward the bathroom when he turned around to find that Katherine had taken her clothes off. Id. Then, “she jolted out the back door.” RP 711.

At about this time his children heard the “boom, boom,” and they got up. RP 712. Paschal did not explain what the “boom boom” would



have been in this account of what happened. Id. He put his pants on, leaving the boxers on the floor, and went to the door and saw her “running all out talking about help.” Id. Paschal returned to find the kids in the doorway of the bedroom, now claiming they awoke to the noise of the sliding glass door.” RP 713. The children in the doorway were Chanelle and Charlise. Id. Paschal admitted at this point in his testimony that earlier in the evening, Katherine had tried to go into the bedroom where their infant son was sleeping to get away from him, but he apparently didn’t let her. RP 714-15.

Paschal testified that he tried to comfort the now-awake Charlise and Chanelle because they were confused. RP 715. He explained to the girls that “mommy hit me,” so he had to hit her back, and then she ran out the door. RP 715. He thought this would “comfort them.” Id.

Paschal decided that his primary concern at that point was for Charlise, and he had to get her “back to her mother.” RP 716. “That’s the only thing that was in my mind was getting my oldest daughter back to her mother.” Id. He went to Katherine’s purse and took her car keys because Katherine left without her car. Id. He also took her phone because he couldn’t find his own phone, so he felt entitled to take hers. RP 716-17. During the search for his phone, however, he caused a mess by throwing couch cushions on the floor and knocking over a Coca-Cola bottle, thereby

explaining the mess the police found on the floor. RP 716. He “took it upon” himself to grab the girls, but not his infant son, and leave the house. RP 717. He reiterated that he wanted to get Charlise “safely to her mom’s house.” Id. Paschal never explained why his intense concern for Charlise did not extend to Chanelle or his infant son. Id. He used Katherine’s car because his cousin had his car. RP 718. He did not explain how it was, then, that he picked up Charlise at 6:30 the prior evening and drove to Katherine’s house. RP 692.

After arriving at Charlise’s mother’s house, Charlise’s mother calmed the girls down and he laid down to “chill.” RP 719-20. It was about 2:00 a.m., according to Paschal. RP 720. At 3:00 a.m. a call came into Katherine’s phone, but he elected to ignore it. RP 720. After sleeping through the night Paschal woke up and “had a feeling the police” might be at Katherine’s house, so he decided to go back and “face the music, whatever it is.” RP 721. He saw sheriff cars in the driveway, but didn’t alert anyone to his presence. RP 721-22. Instead, he used the garage door opener and went inside through the garage. RP 722. Inside the house, he was arrested. Id. He informed the officers that Katherine hit him first. Id.

b. cross examination

Paschal said Katherine was “controlling.” RP 723. When she asked him not to smoke in the house, he did it anyway. Id. He could have walked

away from Katherine and gone downstairs while she was “nagging” him. RP 724-25. But “there was no reason” why he should have to go downstairs. RP 724. He didn’t go downstairs because he “didn’t want to.” RP 725. Paschal admitted that after he pushed Katherine off him after she first struck him, according to his claim, he was able to talk to her and get her to disengage. RP 726. But when she struck him again, he elected not to talk to her or merely push her, but to strike her five times in a row. RP 727. He admitted that he struck her because he was angry with her, not because he needed to defend himself. Id. He was not scared of her, and didn’t fear for his safety. RP 731. He hit Katherine five times because “I just don’t like getting hit.” RP 731. Paschal admitted that blood was pouring out of Katherine’s nose, so much so that it was getting into her mouth. RP 728. Although Katherine wanted to call an ambulance, Paschal decided for her that that wasn’t what she needed. RP 729. He declined the request. Id. He would take her to the hospital himself, according to him, because that was the better plan. Id. He admitted that after she had asked for medical help and been denied it by him, he blocked her from leaving the home. RP 730, 733.

Paschal didn’t have time to get his boxer shorts back on because he wanted to get to the back door and see what Katherine was doing after she succeeded in escaping, but he was not in a rush or a hurry. RP 734. He just

wanted to look at what she was doing in the backyard because he was curious, and it's "what anybody would do." RP 734. The prosecutor asked wouldn't "anybody" also call 911 when asked by someone who says they need help? Paschal replied "I didn't really feel that she was hurt that bad." RP 734. He didn't think she needed an ambulance, and thought that taking her to the hospital himself was "the best way to go." RP 735. He reiterated that he only left the home to get his "daughter out the situation." RP 736. He left his infant son in the home because "I thought [Katherine] was going to come back too. I didn't think she would be out there running crazy, you know, leaving her kids in the house." RP 737. He added "I thought she would have more sense than that to run outside the house with no clothes on." Id. Asked why he didn't at least call 911 to come and get his abandoned infant son, he said "I really don't like 911 in my business." RP 738. He testified that he wasn't really in a rush to get out of the house when he left it in disarray and without his son, but he was "just trying to get my daughter to a safe place." RP 738-39. He admitted that after bloodying Katherine and leaving his son alone in her home, he felt it was okay to just "chill" because Katherine probably got help from someone else. RP 740. Paschal admitted he could have used Katherine's phone to call 911 but he "preferred not to." RP 742.

Paschal admitted he sustained no injury during his assault on Katherine. RP 742.

c. Re-direct examination.

Paschal is adamant he only hit Katherine five times. RP 746. He never put her in a chokehold because he wouldn't use his skills outside the wrestling mat "unless he really has to." RP 746-47. Katherine was just being "dramatic" that night. RP 745, 747. Katherine caused her injuries herself. RP 747-78.

C. PRETRIAL MOTIONS

Paschal indicated that he intended to raise self-defense with respect to the charges of assault in the second degree and as to any lesser included charges of assault in the fourth degree. RP 79. The State sought to admit a past incident of domestic violence between Katherine and Paschal. RP 78. The State believed the prior incident was admissible to show Paschal's intent, to show why the victim only twice tried to escape during this lengthy assaultive episode (which was relevant to the unlawful imprisonment charge), to show why the victim did not take obvious steps to resist the rape (such as biting the defendant), and to rebut a claim of self-defense. RP 78-80, CP 15 (at pages 13-18). The State also argued that the evidence was relevant to the victim's state of mind at trial. *Id.* The

court found that this evidence is generally admissible (under *State v. Baker*, 162 Wn.App. 468, 259 P.3d 270 (2011), the applicable case law at the time) because it bears upon the credibility of a domestic violence victim whose credibility will be attacked, regardless of whether she is a recanting/minimizing witness. RP 78-82. But the court found additional bases for admission of the two prior incidents, including to rebut a claim of self-defense and to explain the victim's placating behavior during the rape and the unlawful imprisonment. RP 78-82. The court's statement on page 81 of the VRP about balancing propensity against the State's alternative bases for seeking admission demonstrated that the court was aware of, and conducted, the required balancing of the probative value of this evidence versus its prejudicial effect. RP 81.

The State also alerted the court it would be presenting hearsay statements from Katherine Martin. RP 85. The court instructed defense counsel to raise an objection to any statement he found objectionable and indicated they would discuss the matter outside the presence of the jury. RP 86. Paschal did not lodge objection to any of the testimony complained of below, evidently believing the State had laid the proper foundation. Report of Proceedings.

Finally, Paschal asked the court to limit the degree to which non-medical witnesses, such as police officers, could testify about the

causation of petechiae. RP 100-101. Defense counsel stated, with regard to petechiae, “I mean, *observations I think are fine*,” but getting into causation would be improper for non-medical witnesses. RP 100. The State replied that it wanted to ask the officers whether they are trained to look for petechiae and why, but not about the specific medical causation of it. RP 101. The trial court agreed to that limitation. RP 101.

#### D. PROCEDURAL HISTORY

Paschal was convicted of assault in the first degree, rape in the first degree, and unlawful imprisonment. CP 167. The defendant was given an exceptional sentence of 360 months on the assault and on the rape, to run concurrently. CP 170. This timely appeal followed.

### ARGUMENT

#### I. Evidence of Paschal’s prior bad act was properly admitted

Prior to trial, the State sought to introduce evidence of a prior incident in which Paschal punched Katherine in the face and injured her nose. CP 15 (Exhibit 1). The State sought to introduce this evidence for three reasons: First, to explain Katherine’s actions on the night of the assault wherein she only twice tried to escape (despite not being pinned down during the entire event) and did not take obvious steps to resist the

rape such as biting Paschal's penis when he forced it into her mouth. The State noted that the latter issue had arisen during defense counsel's pre-trial interview of Katherine. RP 82. Second, to rebut Paschal's claim of self-defense. And third, because it was relevant to the victim's state of mind at trial.

Under certain situations the trial court is permitted to admit evidence of a defendant's other acts of misconduct, so long as the evidence is not used to prove character or "to show action in conformity therewith." *State v. Robtoy*, 98 Wn.2d 30, 41-42, 653 P.2d 284 (1982). ER 404 governs when a trial court may admit evidence pertaining to the character of the accused, a victim, or a witness. ER 404 (b) provides:

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

A reviewing court will review the correct interpretation of an evidentiary rule de novo, as it is a question of law. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Once it is determined that the rule was correctly applied, a trial court's decision whether to admit evidence of other misconduct under ER 404 (b) will be reviewed for "manifest abuse of discretion." *State v. DeVincentis*, 150 Wn.2d 11, 17, 74



P.3d 119 (2003); *State v. Lough*, 125 Wn.2d 847, 856, 889 P.2d 487 (1995). “A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible.” *DeVincentis*, at 17. If the admission of such evidence is erroneous, the standard of review is the nonconstitutional harmless error standard. *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). “A ruling under ER 404 (b) is not reversible error unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Ray* at 546. A reviewing court may affirm the trial court on any proper ground for admission, not necessarily the one relied upon by the trial court. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Finally, any error in admitting such evidence is harmless when there is overwhelming evidence of the defendant’s guilt. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); *State v. Sexsmith*, 138 Wn.App. 497, 157 P.3d 901 (2007).

Prior to admitting evidence under ER 404 (b), the court must find the prior acts are (1) proved by a preponderance of the evidence; (2) admitted for a proper purpose; (3) relevant to prove an element of the offense or to rebut a defense; and (4) more probative than prejudicial. *Lough*, *supra*, at 852.

Prior misconduct is admissible to rebut a defendant's proposed defense. *State v. Wilson*, 60 Wn.App. 887, 891, 808 P.2d 754, review denied, 117 Wn.2d 1010, 816 P.2d 1224 (1991).

As an initial matter, Paschal complains that the trial court did not find the prior acts committed by a preponderance of the evidence and did not conduct the required balancing. The record belies this assertion. The record made by the court, while brief and concise, was nevertheless adequate. The State submitted a lengthy written motion seeking admission of this evidence, and provided police reports as an exhibit to the motion which provided the proof by a preponderance that the prior act occurred. CP 15 (pages 13-18, Exhibit 1). We can infer that the trial court relied upon this factual recitation. Moreover, defense counsel did not object to the trial court's consideration of these documents. In explaining its basis for admission of this evidence, the trial court noted the requirement that the probative value of the evidence must outweigh its prejudicial effect. To be sure, the trial court did not use formulaic or scripted words. The State has found no authority which holds that a precise, talismanic recitation of the standard for admission, borne directly from case law and the rule itself, is a pre-condition to admission of this evidence, nor has Paschal cited to any such authority. The trial court performed the necessary balancing on the record.

Taking the court's bases for admission of the prior assault in reverse order, the trial court's reasoning that the prior assault was admissible as relevant to Katherine's credibility while testifying may not be sound. Our Supreme Court recently held that evidence of the defendant's prior abusive acts against the victim were not admissible to show the victim's credibility or for impeachment where there is no evidence of injuries to the alleged victim and the victim neither recants nor contradicts prior statements. *State v. Gunderson*, 181 Wn.2d 916, 924-26, 337 P.3d 1090 (2014). This case had not yet been decided when the trial court decided the admissibility of the evidence in this case.

However, this Court may affirm the trial court's admission of the evidence if it would have been properly admitted for another reason. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). In *Powell*, the Supreme Court stated that the appellate court may "consider bases mentioned by the trial court as well as other proper bases on which the trial court's admission of evidence may be sustained." *Id.*

In *Powell*, the Washington Supreme Court found that evidence of the defendant's hostile relationship with his wife was properly admitted to show his motive for her murder. *State v. Powell*, 126 Wn.2d at 260-61. The Court found that "motive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to

act.” *Id.* at 259. As in *Powell*, Paschal had motive to harm Katherine. This motive was best evidenced by his insecurity when she showed attention to their children rather than him. And in *State v. Hoyer*, the Court stated, “[e]vidence of previous quarrels and ill-feeling is admissible to show motive.” *State v. Hoyer*, 105 Wn. 160, 163, 177 P. 683 (1919). In this case, it would be difficult for a jury to understand why Paschal would all of a sudden attack Katherine in the way, and to the extent, that he did. This evidence is relevant to show that the crime occurred and the manner in which it occurred.

The evidence was admissible to rebut Paschal’s claim that the victim fabricated the vast majority of her account of the assault and the entirety of her account of the rape. It was relevant to rebut his claim that her injuries, save for that which she would have incurred by a mere five blows to the head, were self-inflicted. In *State v. Nelson*, 131 Wn.App. 108, 125 P.3d 1008 (2006), the Court held that a defendant’s prior acts of violence against the victim were admissible to rebut his defense that the victim fabricated the events. As noted above, Paschal claimed that Katherine’s version of events was fabricated and that the majority of her injuries were self-inflicted.

The evidence was also relevant to rebut Paschal’s ludicrous claim of self-defense. Putting aside for the moment that he defeated his self-

defense claim with his own testimony, at the time the evidence was admitted Paschal had stated his intention to rely upon self-defense. In *State v. Thompson*, 47 Wn.App. 1, 11-12, 733 P.2d 584 (1987), the Court of Appeals found evidence properly admitted under ER 404 (b) to show the absence of self-defense and to show a continuing course of provocative conduct on the part of the defendant.

Finally, the evidence was relevant to show why the victim only twice tried to escape despite having several opportunities, at least in a technical sense, to try. It was relevant to show why she wouldn't employ obvious tactics to resist the type of rape wherein a man shoves his penis into a woman's mouth. Unlike a stranger rape scenario, where it is well recognized that women have been coached repeatedly never to resist a stranger rape lest she might get murdered, this case is different. The defendant was Katherine's long-time boyfriend and the father of her children. Because he had never attempted to murder her before, the jury might have questioned why she didn't think she could employ basic resistance tactics without getting murdered.

The court did not abuse its considerable discretion in admitting evidence of the defendant's prior punch of Katherine. Finally, Paschal's attempt to repackage this claim as one of constitutional error is unavailing where it is clearly established the erroneous admission of ER 404 (b)

evidence is evidentiary error reviewed under the abuse of discretion standard. *Gunderson*, supra, at 926.

Even if the trial court erred, the error was harmless. Indeed, it was harmless under either the non-constitutional harmless error standard or the constitutional harmless error standard. The evidence against Paschal was overwhelming and insurmountable. The evidence in question, it must be noted, was of minor moment in the overall trial. It was touched on briefly during the direct examination of Katherine. And it could hardly have been surprising for the jury to learn there had been a past instance of violence between Paschal and Katherine given what the jury learned about what happened that night, and given the pictures of Katherine that were admitted into evidence. The evidence of the prior punch several years before did not, within reasonable probabilities, materially affect the outcome of the trial.

Katherine's testimony was compelling and largely unrefuted, save for Paschal's weak attempt to rebut her claims. She was consistent on every salient point of the event. Numerous witnesses (most of whose testimony Paschal does not challenge here) also testified to Katherine's statements, which were consistent with one another as well as consistent with Katherine's trial testimony and her observable injuries. Katherine's injuries overwhelmingly showed Paschal's intent to inflict great bodily

harm (the existence of which he does not challenge here). Katherine was rendered unrecognizable to the *husband of her best friend*. The visible remnants of this vicious attack were visible on Katherine for weeks. Katherine had no reason to fabricate her claims, nor did Paschal produce any believable explanation for why she might do so. The pictures of Katherine's injuries proved she had been the recipient of a brutal, sustained attack. The injuries were too overwhelming to have been self-inflicted. The pictures depicting petechiae and finger marks around Katherine's neck, as well as her blood red eyes, proved the truth of her account of having been strangled nearly to death.

But some of the most compelling and damaging evidence to Paschal in this case came from his own foolish mouth, and the mouth of his young daughter, Charlise. Paschal, perhaps believing that he had succeeded in influencing Charlise's testimony, called Charlise as a witness in his defense. Charlise's testimony was devastating to Paschal. Charlise testified she and her sister fell asleep after watching movies. RP 751. She awoke to "thumping and screaming" coming from outside the bedroom door. RP 751. She stepped outside the door and saw Katherine on the floor, and Paschal "standing up with his fist up in the air." RP 752. Charlise described what happened next:

He told me to go back in the room, but I tried to get the baby. And he grabbed me and my sister and ran out the door. It took a little while to get out because Katie kept on trying to grab his shirt and bring him back in with me and my siblings.

RP 752.

When Paschal tried to capitalize on Charlise's inadvertent suggestion that perhaps Katherine was behaving aggressively in grabbing Paschal's shirt and trying to keep him in the house, Charlise clarified "No, Katie was trying to grab him and *snatch us out of his arms.*" RP 752.

Charlise went on to say:

Katie was trying to grab, me, my sister, and that's it. He didn't grab the baby. He just grabbed me and my sister because those were the two people—those were the two that were—me and my sister were the closest to get to.

RP 752.

Despite Paschal's third attempt to elicit testimony from Charlise that might help him, Charlise again stated that Katherine was trying to rescue her and her sister from Paschal. RP 752-53. Charlise testified that paschal grabbed the girls and put them into the car without any shoes or coats on, and took them to Charlise's mother's house. RP 753. He left the baby behind. RP 752.

This testimony was not merely unhelpful to Paschal, it defeated his claim that the only contact between him and Katherine was the brief,



quickly successional five punches he leveled on her, as well as his claim that Katherine was an aggressor. Charlise testified that she saw Katherine on the ground while Paschal stood over her *with his fist raised*. Charlise also corroborated Katherine's desperation in trying to save her children. While it is true that Charlise's testimony differed from Katherine's in that Katherine did not testify about trying to grab the girls from Paschal, Katherine was forthright throughout her testimony about her difficulty in remembering many details of this event. On balance, Charlise was a devastating witness to Paschal.

Finally, Paschal made the decision to forfeit his right to remain silent and provide evidence for the jury's consideration. Paschal's testimony was shocking and an obvious fabrication, almost in its entirety. Paschal's demeanor and answers to questions made him appear as a classic domestic violence batterer. He admitted to restraining Katherine in the home because he knew what was best. He admitted to refusing to call 911 for her because he knew what was best. He admitted to striking Katherine *five times in the face* purely because he was angry. He minimized his conduct to an absurd degree. There is simply no way that Katherine could have sustained the level of injury she sustained, or sustained petechiae throughout her neck and eyes, as a result of five blows to the face. There is no way that Katherine could have (or would have) cut

off her own blood supply to the degree needed to cause petechiae, or self-inflicted disfiguring injuries. The jury saw pictures of Katherine that refuted Paschal's silly account in total. Her left eye was blood red where it was supposed to be white. She was unrecognizable. The medical evidence and pictures proved that Katherine had been strangled with significant force. Paschal's testimony revealed he was arrogant, condescending, and patronizing to Katherine. His own words revealed a shocking level of cruelty toward her. His flight from the home showed consciousness of guilt. His decision to take Chanelle and Charlise showed his continued insistence on terrorizing Katherine. His decision to leave his infant son alone in the house showed the haste with which he was trying to escape, as well as his rank callousness. His decision to steal both Katherine's car and her phone showed that he was trying to keep her not only from getting help, but from reporting his crimes.

Paschal chose to testify, and the jury, as well as this court, is entitled to evaluate his testimony just as it would any other witness. As the State noted during closing argument, Paschal was entitled to a presumption of innocence, not a presumption of credibility. Without Paschal's testimony, the evidence against him was overwhelming. With Paschal's testimony, the evidence is beyond overwhelming. It is insurmountable. Any error in the admission of evidence, whether it be the

404 (b) evidence or the evidence complained of below, was harmless beyond a shadow of a doubt.

**II. The trial court's limiting instruction was not a comment on an evidentiary matter to be decided by the jury**

Paschal claims that the trial court's limiting instruction contained a comment on the evidence. Paschal is incorrect. The instruction in question states:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony and/or photographs pertaining to a previous incident in 2010 between the defendant and Katherine Martin and may be considered by you only for the purpose of assessing Katherine Martin's credibility and/or assessing her actions on March 17, 2013. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 77 (Instruction 5).

Under Article 4, sec. 16 of the Washington Constitution “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076, 1083 (2006). Pursuant to this principle, “a judge is prohibited from conveying to the jury his personal opinion about the merits of the case or from instructing the jury that a fact at issue has been established. *State v. Hartzell*, 156 Wn.App. 918, 936, 237 P.3d 928 (2010), citing *Levy* at 721. For example, in *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321

(1997), the trial court commented on the evidence when it relieved the State of its burden of proving that the defendants were within 1,000 feet of school grounds where the special verdict form contained the phrase “to-wit: Youth Employment Education Program [YEP] School,” thereby informing the jury that the program was, in fact, a school. *Becker* at 64. Jury instructions are reviewed de novo, within the context of the jury instructions as a whole. *State v. Pirtle*, 127 Wash.2d 628, 656, 904 P.2d 245 (1995).

The limiting instruction in this case did not contain a comment on the evidence because it did not remove a disputed factual issue, which was to be decided by the jury, from the jury’s consideration. The existence of the prior bad act that was admitted under ER 404 (b) was not a factual determination to be made by the jury. It was not one of the elements the jury had to find in order to reach a guilty verdict on any count. The existence of the prior bad act was a threshold determination to be made by the trial court as a precondition to its admissibility. Moreover, the language of the instruction, which referred to an “incident,” was not nearly explicit enough to warrant concern that it was a judicial comment. The term “incident” is open to interpretation. The jury could have viewed it as referring to an argument between the victim and Paschal. The instruction

did not say, for example, refer to an “assault” committed by Paschal against the victim. It merely referred to an incident between them.

Even if this instruction were deemed to contain a judicial comment on the evidence, Paschal was not prejudiced by the comment.

Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *Levy* at 723. Here, for the reasons set forth above in section I, any error in this instruction did not prejudice Paschal. The prior assault played a minor role in the evidence as a whole, and Paschal’s conduct in this case was so shocking and appalling that the jury’s knowledge of the prior punch some years earlier did not tip the scale in favor of conviction in an otherwise close case. This case was the opposite of close. Moreover, Paschal *admitted* hitting Katherine five times with a closed fist, and admitted that he did not do it in self-defense but out of anger. The record affirmatively shows that Paschal was not prejudiced by this instruction.

### **III. The defendant received effective assistance of counsel**

Paschal claims that his attorney’s tactical decision not to object to certain testimony constituted deficient performance and that he would have been acquitted of the charges had his attorney lodged timely objections to the statements. Paschal’s claim fails because most of the

testimony was unobjectionable, he elicited some of the hearsay statements he now complains of for tactical reasons before the State even attempted to introduce them, and the verdicts would not have been different had his attorney successfully objected.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). “Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

*Strickland* at 689.

When trial counsel's actions involve matters of trial tactics, the appellate court hesitates to find ineffective assistance of counsel. *State v.*

*Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). “The decision of when or whether to object is a classic example of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989). Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *Madison* at 763; *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *In re Personal Restraint of Davis*, 152 Wn.2d, 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Further, “[t]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). “Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for

new trial or an appeal.” *Swan* at 661, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

- a. The victim’s statements to Deputy Kennison, Detective Luvera, Sgt. Allais, and Nurse Jorgensen.

Paschal complains that his attorney chose not to object to the introduction of the victim’s out of court statements as told to Deputy Kennison, Detective Luvera, Sgt. Allais, and Nurse Jorgenson. Because Paschal elected to relieve the prosecutor and the court from making an exhaustive record on the admissibility of each statement, he cannot now simply point to that lack of explicit foundation and claim ineffective assistance of counsel. Rather, he must show that each and every statement he now complains of was *inadmissible* under any rule of evidence, such that a timely objection should have and would have been sustained. If he cannot make that showing, he necessarily cannot show prejudice. Paschal has not even attempted to meet this burden. Rather, he makes the conclusory statement that “[n]one of the hearsay fit within an exception to the hearsay rule.” Brief of Appellant at 23. This is insufficient to meet his burden of proof.

In the context of a claim of ineffective assistance of counsel for failing to object, the appellant has the burden of showing that the objection would have been sustained. More specifically, where the defendant claims



ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted. *McFarland* at 336, 337 n. 4; *Hendrickson* at 80.

With regard to Kennison, Luvera, and Allais, Paschal fleetingly references the passage of time, which was rather short, between the assault and the statements. Paschal ignores the fact that passage of time alone is but one factor among several in the analysis of whether a statement is admissible as an excited utterance. *State v. Flett*, 40 Wn.App. 277, 287, 699 P.2d 774 (1985); *State v. Fleming*, 27 Wn.App. 952, 956, 621 P.2d 779 (1980). Paschal also asserts that Ms. Martin was not under the continuing stress of the event, ignoring the fact that during this entire period of time, her children were missing and presumed to be with the incredibly dangerous and enraged Mr. Paschal. Every piece of information relayed by Katherine to the officers was necessary for them to assess the danger that Paschal might pose to Chanelle and Charlise, as well as the continuing danger to Katherine. After all, a hospital is not protective custody. A person cannot hide out in a hospital—treatment must be ongoing to stay. Paschal continued to pose grave danger to Katherine until

such time as he was taken into custody. Had Paschal's attorney believed that Ms. Martin was not under the continuing stress of the event, which included her rape, brutal assault, and Chanelle and Charlise being taken by Paschal and still unaccounted for, the prosecutor could have easily laid the foundation as to that element of the excited utterance rule had Paschal timely objected. His lack of objection shows that he believed, having prepared this case for trial, that the prosecutor could successfully make that showing.

With respect to Nurse Jorgensen, Paschal cites a lone portion of the record where Ms. Jorgenson said she did not "diagnose" Ms. Martin. Paschal ignores the part of ER 803 (a) (4) that says "or treatment." Again, because defense counsel chose to relieve the State of its burden to establish a specific foundation that Ms. Jorgensen, in physically examining her patient and comprehensively documenting her vast injuries, was there, at least in part, to offer treatment to Ms. Martin, we can assume that defense counsel was confident the prosecutor would have successfully laid that foundation. Thus, an objection to Jorgensen's testimony would have been fruitless. A sexual assault nurse examiner, it must be noted, need not solely be driven by a treatment motive. *State v. Williams*, 137 Wn.App. 736, 747, 154 P.3d 322 (2007). A sexual assault nurse examiner can have the additional motivation of collecting evidence. *Id.*

Paschal's only argument about why it was deficient for counsel not to object to the admission of these statements is that he believes "repetition" is inherently prejudicial. But he cites no case that holds this. In *State v. Leavitt*, 111 Wn.2d 66, 72-73, 758 P.2d 982 (1988), the Supreme Court held that the defendant was not prejudiced by trial counsel's failure to object to the child victim's testimony where the child's account of the crime was admitted, without objection, through the testimony of her mother and aunt. In other words, the repetitious nature of the victim's testimony negated a finding of prejudice.

Paschal also ignores that prior to the testimony of Luvera, Kennison, and Jorgensen, he brought out certain statements the victim made to these witnesses during cross examination of the victim. Paschal elicited these statements during cross examination because they were impeaching. See RP 287-90. Paschal would have a difficult time arguing that the victim's statements to these witnesses were blanket hearsay when he had already introduced several of them through the victim. The inconsistencies and oddities (such as the lack of bite marks on the defendant's hands) brought out by defense counsel, even though minor in the context of the overall trial, were well worth the admission of these statements because defense counsel had precious little to work with in this case. As noted in the prejudice section below, the evidence against Mr.

Paschal was overwhelming and insurmountable. There is no chance that the admission of the victim's statements through these witnesses was the tipping point causing a conviction in an otherwise close case. This case was not close. Moreover, this is not like the typical domestic violence case where the victim has recanted and testifies for the defendant. In those cases, the admission of the victim's statements to others as substantive evidence can comprise the sole evidence in the case. In that type of case, it is critically important for the defense attorney to fight against admission of those statements. But this case falls in the exceedingly rare category of domestic violence cases where a victim actually testifies for the State, does not recant, and sustained serious injury. In this case, the evidence against the defendant comprising of the victim's testimony, the testimony of the Deynegas, the testimony of the ambulance drivers, the physical/medical evidence, and the defendant's own self-destructive testimony rendered this case overwhelming.

Paschal does not challenge the admission of the victim's statements through Paul Bustamante of AMR, whom she told that the defendant repeatedly beat her in the face, held her against her will for several hours, forcibly pinned her to the floor, held his hands over her mouth, strangled her, prevented her from breathing, and forced his penis into her mouth. RP 205-07. Paschal does not challenge the admission of

the victim's statements through Christopher Thomas of AMR, whom she told that she had been punched several times and was eventually able to escape by scaling multiple fences. RP 225. 227. Paschal does not challenge the admission of the victim's statements through John Eggen, M.D., whom she told that she had been punched in the face with a fist, lost consciousness, been sexually assaulted in her mouth, and been held captive for approximately three hours by the defendant. RP 520. Paschal does not challenge the admission of the victim's statements through Anna Ruef, an emergency room nurse, whom she told that she had been held captive for two hours and severely beaten. RP 537. Paschal does not challenge the admission of the victim's statements through Ludymilla Deynega, whom she told that she had been raped. RP 564. Paschal does not challenge the admission of the victim's statements through Ruslan Deynega, whom she told that she'd been beaten up and held captive by her husband or boyfriend. Paschal's concern over mere repetition of the victim's claims fails when he endorses the admission of the victim's statements through these six additional witnesses.

b. Comparison testimony offered by Sgt. Allais and Nurse Ruef

Paschal complains that his attorney's decision not to object to testimony from Sgt. Allais and Nurse Anna Ruef that, in essence, the victim presented with the worst injuries either of these witnesses had seen

in a domestic violence case. Although comparative testimony such as this is arguably irrelevant to any issue to be decided by the jury, Paschal ignores the fact that this testimony played well to his theory of the case. Paschal's theory of the case, carefully articulated in closing argument, was that the State had overreached in its charging of this case, and the State's witnesses engaged in exaggeration and hyperbole and were biased. RP 835-38. 846. Paschal maintained that while he was certainly guilty of leveling five blows to Ms. Martin's face, albeit done in self-defense, he did not inflict the remainder of her injuries. RP 747. Sgt. Allais, who testified before Nurse Ruef, assisted Mr. Paschal in the development of his exaggeration theory when he testified that this case was "the worst domestic assault that I've seen." RP 449, 835-36.

It must be mentioned at the outset that Sgt. Allais' answer was not responsive to the question he was asked. He was not asked to draw a comparison between this case and any other. RP 448-49. But this testimony worked to Paschal's arguable advantage when his attorney, Mr. Schile, impeached Allais on this rather ridiculous exaggeration. During cross examination, Mr. Schile brought out that Sgt. Allais had investigated a domestic violence murder case in which the defendant had bludgeoned his victim to death with a hammer. RP 493-94. Sgt. Allais was also forced to admit that he'd investigated domestic violence cases in which the

victims sustained broken arms, broken eye sockets, and internal injuries including damaged organs and internal hemorrhaging, which a lay person would understand to be life threatening. RP 494. This testimony stands in stark contrast to the fact that the victim in this case was released from the hospital approximately seven hours after arriving there, and was apparently able to clean up her house with the help of her father (including getting the blood out of the carpet) upon her return home that day. RP 521, 641. Sgt. Allais even expressed surprise that he'd even made the remark on direct examination, exclaiming "did I say worst?" RP 493.

Exaggeration leads to an impression of bias. Sgt. Allais appeared biased in this instance, as opposed to a neutral reporter about what he found during the course of his investigation. Thus, Mr. Schile's decision not to object to this testimony was a reasonable tactical decision. Anna Ruef's similarly non-responsive testimony likewise contributed to Paschal's theme of exaggeration and bias. As an emergency room nurse it strains credulity to believe that this was the most severe case of domestic violence she had seen in her practice, particularly in light of the victim's somewhat rapid release from the hospital and her ability to clean her home less than twenty-four hours after this assault. And because Sgt. Allais had already made such a comment and been thoroughly impeached on it by the time Nurse Ruef testified, there would be little point to lodging an

objection to this testimony. As with Sgt. Allais, it made Nurse Ruef look biased. The fact that Paschal was ultimately convicted, again, is not the standard for determining whether counsel's decision not to object to this testimony fell outside "the wide range" of acceptable professional decisions. *Strickland* at 689. An attorney's decision not to object to testimony that he may feel he can use to his client's advantage must be given a high degree of deference. *Id.* Moreover, as noted above, the decision not to object suggests that the testimony did not appear particularly damaging or impactful to the case.

c. Injuries appear "consistent"

Paschal complains about two instances where witnesses testified that the injuries they observed on the victim were consistent with her account. With injuries as visible and severe as the victim suffered in this case, this testimony was arguably neutral and unremarkable. That these witnesses observed injuries consistent with an assault is hardly significant where the defendant admitted to leveling at least five closed fist blows to the victim's face. In *State v. Thach*, 126 Wn.App. 297, 311, 106 P.3d 782 (2005), this Court found it insufficient to even review the claimed error where the defendant claimed on appeal that a doctor's testimony invaded the province of the jury where the doctor testified "I guess it appeared to me, after examining her, that it was likely that what she had told me had



happened to her was true.” *Thach* also involved a conviction for domestic violence assault. The testimony offered in this case is markedly less direct or explicit as the testimony offered in *Thach*.

Paschal appears to argue that this testimony was 1) an improper medical opinion on the part of Detective Luvera and Deputy Kennison as to the strangulation, and 2) was a statement suggesting there was physical evidence supporting the oral rape, and that said evidence was consistent with the victim’s account of the rape.

As to the former, defense counsel at trial, Mr. Schile, would clearly disagree with current defense counsel that Luvera and Kennison’s statements constituted a medical opinion about strangulation because he elected not to object to this testimony. Having been the proponent of the motion in limine to limit the ability of the officers to testify about the specific mechanism of petechiae, Mr. Schile obviously didn’t believe that this testimony crossed that line. That view was reasonable on his part. The trial court did not limit the officers from testifying about outward physical evidence of petechiae or of a neck having been grabbed and squeezed, nor did Paschal ask to have such testimony excluded. RP 100. Rather, the court disallowed testimony about how strangulation *causes* petechiae in a scientific sense. The testimony of Luvera and Kennison fell within that scope, and Mr. Schile’s decision not to object to that testimony was not

constitutionally deficient performance. Moreover, Paschal does *not* complain about Sgt. Allais being permitted to testify that his observations of Katherine's injury, to include his observation that she appeared to have been strangled and that the presence of petechiae is one of the bases on which he based that observation, was consistent with her story. Paschal cannot show prejudice when he complains only about two witnesses offering such testimony while ignoring the third.

As to the latter claim, the jury could not have believed that the witnesses were testifying about having observed injury caused by the rape, where the rape alleged was oral and Katherine testified that Paschal did not ejaculate. The jury would have known that the witnesses were referring to injuries consistent with the victim's claim of *assault*.

Finally, if Paschal feels as though this testimony constituted improper opinion, why not raise the error directly by satisfying RAP 2.5 (a)? This testimony, which was fleeting, fairly unremarkable, and substantially less concerning than the testimony offered in *Thach*, was not the reason Paschal was convicted. He would not have been probably acquitted in the absence of this testimony.

- d. Paschal has not shown prejudice based on his current counsel's disagreement with his trial counsel's tactical decisions

Even deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable effect on the outcome.” *Strickland* at 693. “In doing so, ‘[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (quoting *Strickland* at 694).

“Criminal defendants are not guaranteed ‘successful assistance of counsel.’” *State v. Dow*, 162 Wn.App. 324, 336, 253 P.3d 476 (2011), quoting *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) and *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Not every error made by defense counsel that results in adverse consequences is prejudicial under *Strickland*, supra. *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011). Whether a “strategy ultimately proved unsuccessful is immaterial.” *Grier* at 43, see also *Dow*, supra, at 336. Last, with respect to

the deficient performance prong of *Strickland*, “hindsight has no place in an ineffective assistance analysis.” *Grier* at 43.

The State incorporates the arguments it made in section I, above, about why any error in Mr. Schile’s decision not to object to the complained of testimony did not cause him prejudice. The absence of the complained of testimony would not have probably resulted in Paschal’s acquittal, the standard for reversing a jury’s verdict based on ineffective assistance of counsel. This assignment of error is not satisfied.

**IV. The trial court properly held that the rape and assault convictions did not merge**

In this case, separate judgments for the assault in the first degree and rape in the first degree do not violate the prohibition on double jeopardy. The rape had an independent purpose and effect, and the jury was not required to find *any injury* in order to find guilt on the assault count.

The merger doctrine prevents the State from seeking dual punishments for one crime when it merely furthers, or is a predicate to, another charged crime. *State v. Johnson*, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979). Merger will apply when the legislature has defined a crime in such a way that “in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that the defendant

committed that crime (e.g., rape) but that the crime was accompanied by an act [that] is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping.)” *State v. Saunders*, 120 Wn.App. 800, 820, 86 P.3d 232 (2004), citing *State v. Deryke*, 110 Wn.App. 815, 823, 41 P.3d 1225 (2002). For merger to apply, a crime must be elevated to a higher degree by proof of a different crime. *Saunders* at 820, citing *State v. Parmelee*, 108 Wn.App. 702, 710, 32 P.3d 1029.

Here, the rape was not “incidental” to the assault. To prove assault in the first degree, the State was required to prove that Paschal, with intent to inflict great bodily harm, assaulted Katherine by means or force likely to produce great bodily harm or death. See RCW 9A.36.011. In contrast, to prove rape in the first degree, the State was required to prove that Paschal engaged in sexual intercourse with Katherine by forcible compulsion, and that he inflicted serious physical injury upon Katherine. See RCW 9A.44.040. The State proved assault in the first degree by way of Paschal’s repeated closed-fist blows to Katherine’s head, and by his strangulation of Katherine and his obstruction of her breathing. Paschal did not strangle Katherine during the rape. Paschal continued to assault and hurt Katherine during the rape, although Katherine described it as “less intense” than the vicious blows to her head and the strangulation in which Katherine nearly lost her life. Indeed, even a violent, injurious

assault would be less intense than the incredibly brutal assault that Katherine suffered before and after the rape.

As the State noted at sentencing, *State v. Johnson*, supra, is distinguishable because in that case, the defendant committed the assault for the sole purpose of effectuating the rape and to compel the victims' compliance to sexual intercourse. *Johnson* at 681. In *Johnson*, the victims sustained "no injury independent of or greater than the injury of rape." *Johnson* at 681. Paschal did not need to rape Katherine in order to strangle and suffocate her. He did not need to rape her in order to inflict vicious and repeated blows to her head. Likewise, Paschal did not need to employ force even close to what he applied during the strangulation and the repeated, hours-long punching in order to put his penis in her mouth by forcible compulsion with infliction of serious physical injury. Katherine suffered separate and distinct injury from the rape during the strangulation and suffocation, which occurred *after* the rape. As the State correctly observed, the rape took place outside the context of the assault. RP 902. The assault took place for Paschal's amusement, among other things. It had nothing to do with sexual gratification. The rape, however, was done for the purpose of sexual gratification. As Katherine testified, Paschal was attempting to become erect when he forced his penis into her mouth.

These crimes were entirely separate. The trial court properly held that the rape and assault did not merge.

**V. The trial court properly found the assault and the rape were separate and distinct conduct, and properly sentenced these crimes under RCW 9.94A.589 (1) (b).**

Paschal claims that the trial court erred in sentencing him under the provisions of RCW 9.94A.589 (1) (b), rather than RCW 9.94A.589 (1) (a). This is so, Paschal claims, because the trial court did not make a finding of separate and distinct conduct, and that any such finding would be an abuse of discretion in any event.

First, Paschal's claim fails to the extent it is premised on his assertion that the trial court did not make a finding of separate and distinct conduct. The court made this finding at page 914 of the VRP. The court said:

I spent extensive time doing research of my own through Westlaw. I am convinced that the Rape 1, the Assault 1, and the Unlawful Imprisonment are three separate charges within the meaning of double jeopardy, within the meaning of merger, and *within the meaning of same criminal conduct*.

RP 914 (emphasis added).

Is Paschal asserting that the trial court failed to make a finding of separate and distinct conduct because it used the verbiage "same criminal conduct?" If so, Paschal is confused. Offenses which do not constitute

same criminal conduct are necessarily considered separate and distinct. *State v. Brown*, 100 Wn.App. 104, 111, 995 P.2d 1278 (2000), *reversed in part on other grounds*, *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). The court's finding in this case constitutes a finding of separate and distinct conduct for purposes of RCW 9.94A. 589 (1) (b).

To the extent Paschal claims that the trial court abused its discretion in finding separate and distinct conduct, he is also incorrect. As an initial matter, Paschal misstates the burden of proof below. He cites to *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.2d 219 (2013) for the proposition that whereas the defendant has the burden of proving same criminal conduct, the State bears the burden of proving separate and distinct conduct under RCW 9.94A.589 (1) (b). *Graciano*, however, does not say that. It says the opposite. *Graciano* holds that whereas it is the State's responsibility to prove *the existence of a prior conviction*, it is the defendant's burden to prove that current crimes constitute the same criminal conduct (and, conversely, that they do not constitute separate and distinct conduct). Whereas the existence of a prior conviction finding benefits the State, a finding of same criminal conduct as benefits the defendant by lowering his offender score. *Graciano* did not hold that separate and distinct offenses under RCW 9.94A.589 (1) (b) is different



than same criminal conduct under .589 (1) (a) for purposes of who bears the burden of proof. *Graciano* at 538-39.

Because finding separate criminal conduct is the same as finding separate and distinct conduct under .589 (1) (b), Paschal bore the burden of proving separate and distinct conduct below. And because the portion of *Graciano* on which Paschal appears to rely speaks to proving the *existence of a prior conviction*, not whether a current offense is to be considered separate and distinct from another current offense, Paschal's argument on this point should be disregarded.

The trial court found Paschal's crimes to be separate and distinct, and that finding was not an abuse of discretion for the same reason that the court correctly found the assault and the rape did not merge. The crimes had separate criminal intent. The purpose of the assault was to gravely injure, torture, and punish Katherine. It was done for Paschal's entertainment and to satisfy his anger. The rape, however, was committed for Paschal's sexual gratification. Indeed, Katherine testified about Paschal's fruitless attempts to become erect. These two crimes merely happened during the same general time frame, but they were separate and distinct. Neither one furthered the other. Paschal has not met his burden of showing that the trial court abused its discretion in treating these crimes as separate and distinct.

Finally, even if Paschal were correct, resentencing is not required. If Paschal is correct that he should have been sentenced under RCW 9.94A.589 (1) (a), then his offender score as to the rape in the first degree and unlawful imprisonment would remain the same. His offender score as to assault in the first degree, however, would rise from zero to three. But resentencing is not required where the defendant's standard range would rise rather than fall. See *State v. Kilgore*, 141 Wn.App. 817, 824, 172 P.3d 373 (2007) ("We agree with the State that *a reduced standard range*, not a reduced offender score, requires resentencing on remand.) (Emphasis in original). Further, remand for resentencing is not necessary where the record makes clear that the trial court would impose the same sentence. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003); *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997); *State v. Jackson*, 129 Wn.App. 95, 109 n. 14, 117 P.3d 1182 (2005). This is especially true where a defendant does not challenge his exceptional sentence: "An appellate court may remand for resentencing for an erroneous offender score but leave the otherwise valid exceptional sentence intact." *State v. Rowland*, 160 Wn.App. 316, 328, 249 P.3d 635 (2011). At most, then, Paschal would be entitled to correction of his offender score as to count 2, not resentencing (as to any count).

Here, the trial court declared an exceptional sentence downward by running counts two and three concurrent with one another, and declared an exceptional sentence upward on each of these counts by imposing 360 months on each (to run concurrent). The trial court made it crystal clear that it would impose the same sentence if the sentence were in any way disturbed as to one count: “If this case were sentenced just on Rape 1 or just on Assault 1, the sentence would be the same. It’s 360 months. That’s the sentence of the Court.” RP 926. The court characterized Paschal’s behavior as “absolutely appalling.”<sup>2</sup> RP 926.

Paschal’s claim fails.

**VI. The court considered Paschal’s ability to pay legal financial obligations on the record, and paschal failed to preserve this claim by objecting below.**

Paschal claims that the trial court imposed discretionary legal financial obligations without considering his ability to pay at sentencing.<sup>3</sup> Putting aside for the moment that this assertion is not supported by the

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<sup>2</sup> Paschal does not challenge the court’s decision to impose an exceptional sentence based on the jury’s finding of an aggravating factor, nor does he challenge the length of the exceptional sentence.

<sup>3</sup> Paschal purports to challenge the imposition of \$9142 in legal financial obligations. But Paschal ignores that \$2955.33 of that amount is for mandatory fees (restitution, DNA fee, Victim Assessment, and domestic violence assessment). CP 191. In the case of mandatory legal financial obligations, “the legislature has divested courts of the discretion to consider a defendant’s ability to pay when imposing these obligations. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant’s ability to pay should not be taken into account.” *State v. Lundy*, 176 Wn.App. 96, 102, 308 P.3d 755, 758 (2013).

record, Paschal should not be permitted to object to the imposition of discretionary LFOs for the first time on appeal. As an initial matter, Paschal repeats the oft-stated argument in so many LFO challenges that the trial court relied on “boilerplate” language in the judgment and sentence to find the defendant able to pay. This is incorrect. The court *memorialized* the finding she made at sentencing by using pre-printed language in the judgment and sentence. But the finding itself was made at sentencing on the record. Paschal’s claim that the trial court did not conduct a particularized inquiry at sentencing is belied by the record. At page 933 of the VRP, the court stated that it found the defendant able to pay his legal financial obligations based on his trial testimony. The defendant’s own testimony is replete with evidence of his ability to work and earn money. RP 684-87. During his testimony, Paschal came off as quite defensive about the portion of Katherine’s testimony where Paschal said he would rob her (but not so much about the portion where he said he would rape and kill her), and gave extensive testimony about his career as a barber and party promoter, as well as his earning potential. He also testified about his physical prowess, which showed that he can work both in prison and once he’s released. When the trial court stated at sentencing that she would rely on the defendant’s testimony to find him able-bodied and capable of paying, defense counsel had no reason to object to the

finding of ability to pay. If he had, the trial court would have merely reiterated what Paschal said in his testimony and reached the same conclusion. At what point can we say that a defendant is able to earn money both in prison and once released? Should the trial court have ignored Paschal's extensive testimony about his ability to make a good living? This issue was not raised below, and with good reason given the evidence in this record. Paschal should not be able to complain about this for the first time on appeal when the trial court expressly noted the facts on which it would rely and Paschal chose to remain silent.

“A defendant who makes no objection to the imposition of discretionary LFOs (legal financial obligations) at sentencing is not automatically entitled to review” of that issue on appeal. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). The defendant is not entitled to review because in Washington it is “well settled that an ‘appellate court may refuse to review any claim of error which was not raised in the trial court.’” *Id.* (quoting RAP 2.5(a)). Thus, under *Blazina*, it remains the law that “[u]npreserved LFO errors do not command review as a matter of right.” *Id.* Accordingly, *Blazina* held, regarding the consolidated cases on review, that “the Court of Appeals did not err in declining to reach the merits” of the LFO issue, and instead, “properly declined discretionary review.” *Id.* at 830. Moreover, in *State v. Duncan*, 180 Wn.App. 245, 250,

327 P.3d 699 (2014), the Court of Appeals recognized that declining to argue future inability to pay LFOs can be a *legitimate tactical decision* on the part of the defendant and his counsel.

There is no compelling reason in Paschal's case for this Court to utilize its discretion and decide the merits of the LFO issue. The State respectfully asks this court to decline to address his LFO challenge.

Should this Court elect to reach this unpreserved claim, it should affirm the trial court. Here, the trial court did expressly consider the defendant's ability to pay LFOs. The fact that she relied on the boasting that came from the defendant's own mouth at trial, rather than the boasting that likely would have flowed from his arrogant mouth at sentencing, is of no moment. At trial, the defendant bragged that he was a party promoter who could earn between \$700 and \$2000 per night, and that he could do shows two nights per month. He told the jury that he is a self-employed barber and can make \$30,000 per year in his trade. He described it as a "good living." RP 686. He boasted that he is a trained fighter and former state wrestling champion, demonstrating that he is not disabled and is physically capable of doing anything, including nearly murdering the mother of his children without sustaining so much as a scratch.

Paschal cites no authority that the court is *precluded* from considering evidence offered by the defendant himself at his trial in

determining the ability to pay LFOs, and that the court is somehow required to begin the inquiry anew at sentencing.

Paschal also confuses constitutional indigency with indigency for purposes of being awarded court-appointed counsel, which are different things. (Paschal's reliance on the passage of *Blazina* which suggests that perhaps indigency for purposes of appointment of counsel should also be regarded as constitutional indigency is misplaced, as this passage is dictum). The trial court's finding of indigency addresses a different question. In deciding whether to appoint counsel pending appeal, the court must apply the definition of indigence set out in RCW 10.101.010. *State v. Johnson*, 179 Wn.2d 534, 315 P.3d 1090 (2014). Under that definition, a person is "indigent" if, among other tests, he has an income less than 125% of the federally established poverty level. A person may be indigent under this definition and still have the availability to make regular payments. Paschal's claim fails.

## **VII. The court correctly instructed the jury on reasonable doubt.**

Paschal claims that the trial court erroneously instructed the jury on reasonable doubt. Paschal did not object to this instruction at trial. RP 663-669. Paschal advances no argument as to why he can raise this instructional issue for the first time on appeal. The general rule is that an

issue, theory, or argument not presented at trial will not be considered on appeal. RAP 2.5(a); *State v. Hayes*, 165 Wn.App. 507, 514, 265 P.3d 982 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995)). This “rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1998) (citation omitted).

The rule has additional force when applied to criminal cases in which claimed errors in jury instructions are raised for the first time on appeal because “CrR 6.15(c) *requires* that timely and well stated objections be made to instructions given or refused ‘in order that the trial court may have the opportunity to correct any error.’” *Id.* at 685-86 (emphasis added) (quoting *Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)). Accordingly, our Supreme Court has “with almost monotonous continuity, recognized this procedural requirement and adhered to the proposition that, absent obvious and manifest injustice, we will not review assignments of error based upon the giving or refusal of instructions to which no timely exceptions were taken.” *State v. Louie*, 68 Wn.2d 304, 312, 413 P.2d 7 (1966) (citing cases). Thus, it is unsurprising



that “[c]iting this rule or the principles it embodies” our Supreme Court “on many occasions has refused to review asserted instructional errors to which no meaningful exceptions were taken at trial.” *Scott*, 110 Wn.2d at 686 (citing cases).

Because Paschal advances no argument as to why he should be able to raise this issue for the first time on appeal this court should decline to consider it.

If this court decides to reach the merits of the issue, Paschal’s argument still fails. Paschal asserts that the trial court instructed the jury on an incorrect definition of reasonable doubt. Br. of App. at 3-12. He claims that WPIC 4.01, the pattern instruction used in this case, misstates the burden of proof by defining a reasonable doubt as “one for which *a* reason exists.” WPIC 4.01 (emphasis added); CP 41 (Instruction 3) (“A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.”). This, he claims, improperly requires the jury to articulate a reason for its doubt.

The Washington Supreme Court, however, has expressly approved this instruction. *State v. Bennett*, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007). There, the court noted that the instruction was adopted from well-established language in *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959), in which the court, nearly sixty years prior, observed that “[t]his

instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error criticizing the instruction] without merit.” *Bennett*, 161 Wn.2d at 308 (quoting *Tanzymore*, 54 Wn.2d at 291 (alterations original as quoted)). Indeed, the court in *Bennett* approved so strongly of WPIC 4.01 that it exercised its inherent supervisory authority to require trial courts in this state to issue WPIC 4.01—and *only* WPIC 4.01—in defining reasonable doubt. *Bennett*, 161 Wn.2d at 318.

Paschal has provided this court with no convincing basis upon which to depart from the holding of *Bennett*. See *State v. Watkins*, 136 Wn.App. 240, 246, 148 P.3d 1112 (2006) (observing that the Court of Appeals will follow the precedent of the Washington Supreme Court). Even if this court were inclined to entertain such a challenge, Paschal bears the burden of making a “clear showing” that WPIC 4.01 is “incorrect and harmful.” *In re Stranger Creek & Tributaries in Stevens Cnty.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). He has not met his burden.

Moreover, Paschal’s argument has also been raised and rejected in the Court of Appeals. In *State v. Thompson*, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975), the defendant argued that the phrase, ““a doubt for which a reason exists[.]’ . . . misleads the jury because it requires them to assign a reason for their doubt, in order to acquit[.]” *Thompson* rejected this

argument because “the particular phrase, when read in the context of the entire instruction does not direct the jury to assign *a reason* for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary.” Id. at 5 (emphasis added).

Because the jury was properly instructed this court should affirm Paschal’s convictions.

### CONCLUSION

Paschal’s judgment and sentence should be affirmed in all respects.

DATED this 11<sup>th</sup> day of September, 2015.

Respectfully submitted:

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## CLARK COUNTY PROSECUTOR

**September 11, 2015 - 12:08 PM**

### Transmittal Letter

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